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No. 123

JAMES R. BRE...

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

AMERICAN DREDGING COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR AMERICAN DREDGING COMPANY.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 981

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

AMERICAN DREDGING COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM FOR AMERICAN DREDGING COMPANY.

The question presented is whether the purposes of the Act (61 Stat. 136; 29 U. S. C. 151, *et seq.*) are effectuated when an Employer is directed to refund to its employees all dues and other fees paid by them to a Union, which is their duly constituted collective bargaining agency, whenever the Board concludes (regardless of the evidence) that a collective bargaining agreement contains illegal clauses or that the Employer has in some way given preference in employment to members of a Union. This remedy, known as the *Brown-Olds* remedy*, has become a Board policy and

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* It was first enunciated in *United Association, etc., and J. S. Brown-E. F. Olds Plumbing and Heating Corp.*, 115 NLRB 594 (1956).

has been applied even though the Board has held that there was "no evidence that the unlawful contract clause had been followed in practice". *NLRB v. Puerto Rico Steamship Association, et al.*, 125 NLRB No. 70. The Board was reversed on June 23, 1960 by the U. S. Court of Appeals for the District of Columbia Circuit, No. 15,474.

The Union, in the instant case, was not a party to the proceedings before the Board and it did not intervene in the enforcement proceedings which the Board instituted in the Court below.

Since the Employer had little or no interest in that part of the Board's Order which directed that it withdraw and withhold all recognition from the Union unless and until the Union demonstrated its exclusive majority representative status pursuant to a Board-conducted election among the employees, it devoted but cursory attention to that part of the Board's Order.

Despite the fact that there is not one scintilla of evidence that the Hiring Engineer [Patterson] referred to in paragraph 25 of the collective bargaining agreement (General Counsel's Exhibit 2, *B. A. 57a, 58a) ever hired a single employee the Board states, at page 4 of its Petition: "Patterson, in fact, hired only employees referred for employment through the Hiring Hall".

Patterson never hired a single employee for the American Dredging Company; in fact the Record is clear that Samuel Blair, the one man whom he tried to get the Company to hire was not hired. The Record establishes without question that all of the hiring was done by the Company's Personnel Manager, Mr. Olson (B. A. 64a and 65a).

*"B.A." refers to the appendix to Board's brief in the Court below.

The Board also concluded that Patterson was a supervisory employee of the Company (B. A. 22a) but there is no evidence to support this conclusion except an inference based upon paragraph 25 of the collective bargaining agreement (B. A. 57a, 58a). The fact is that Patterson was an Assistant Business Agent for the Union as shown by exhibits offered by the Company but rejected by the Board (*C. A. 56a to 60a).

The Board's admitted policy is to apply the *Brown-Olds* remedy regardless of whether the Employer initiated, fostered and dominated a Company Union and then signed a closed shop agreement with it as in *Virginia Electric & Power Co.* v. *NLRB*, 319 U. S. 533, or whether the employees freely joined and supported the Union as in *NLRB* v. *McGough Bakeries*, 153 F. 2d 420, 425; and *NLRB* v. *Englander Co.*, 237 F. 2d 599.

The Courts, on the other hand, have looked at the facts in each case and have either reversed or sustained the Board, depending upon whether the Court felt that the *Brown-Olds* remedy effectuated the policies of the Act.

This is a case where there was no discrimination in regard to hire or tenure of employment, yet the Board ordered the maximum penalty and now seeks to have this Court reverse the Court below in light of the following facts:

On January 8, 1960, the Court below rendered its decision which set aside the *Brown-Olds* remedy but sustained the Board in directing that the Company withdraw and withhold recognition from the Union.

On January 11, 1960, the Company complied with the Board's Order, as modified by the Court below, and so notified the Board, except that it did not and could not

*"C.A." refers to appendix to Company brief in the Court below.

post the Notices because the Board had not supplied them to the Company for posting.

On January 15, 1960, the Company requested that the Board furnish it with the appropriate Notices, as provided for in the decree of the Court below, so that they could be posted.

On January 19, 1960, the Board refused the Company's request of January 15, on the ground that it had not as yet received the Court's Decree.

On February 4, 1960, the Company applied formally to the Court below and requested that the Decree be entered forthwith.

On February 11, 1960, a Decree was duly entered.

On February 12, 1960, the Board filed a petition for a rehearing.

On February 16, 1960, the Union filed with the Board a petition for certification of representatives pursuant to Section 9 (c) of the National Labor Relations Act but the Board ruled that no election could be held until the appropriate Notices had been posted for a period of sixty (60) days. The Board refused to give the Company the said Notices as provided for in the Court's Decree.

By March 13, 1960, the Board had taken no action on the Union's Petition dated February 16, 1960, and the employees of the Company went on strike at midnight for the purpose of forcing the Company to recognize the Union.

On March 15, 1960, as a result of a three-way telephone conference between Judge Staley, who was in Pittsburgh, the Regional Director for the 4th Region of the Board and counsel for the Company, the Board furnished the Company with the Notices as provided for in the Court's Decree. The said Notices were immediately signed by the President of American Dredging Company and posted the same day.

On March 18, 1960, as a result of a Hearing the Court below entered an Order reducing the period of publication of the said Notice from sixty (60) days to fifteen (15) days (Board's Petition pp. 16 and 17) and the strike ended at 4:00 P. M.

On March 22, 1960, the Board notified the Company and the Union of a joint conference to be held on March 25, 1960, to arrange for a consent election.

On May 5, 1960, the Board held a consent election in which 401 employees voted, i.e., approximately 90% of those eligible, and 401 employees voted to have the Union as their collective bargaining representative.

Can anyone reasonably believe that it would be just or could effectuate the policies of any just law to make this Company repay initiation fees and dues to those who, not only freely joined and supported the Union, but went on strike to compel the Company to recognize the Union in the face of a Court decree forbidding the Company to do so; and, then, when given the opportunity to vote by secret ballot, voted 100% to have the Union as their collective bargaining representative.

The Court below was correct when it stated: "In the circumstances of this case, we cannot perceive how reimbursing employees who the evidence shows were all Union members for initiation fees, dues and other monies paid to the Union could in any way effectuate the policies of the Act."

This case presents the same question as those involved in Nos. 846, 929, 937 and 978 *only to the extent* that in the five (5) cases the Board applied the *Brown-Olds* remedy. The facts in each case were entirely different; therefore, what the Board is seeking is to have this Court lay down the rule that a Remedy should not be tailored to an offense

but should be applied mechanically and without taking into consideration the equities of the case. Such a rule would be repugnant to all the principles of equitable jurisprudence and the time of this Court should not be wasted considering such a matter.

Conclusion.

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

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Dated: New York, N. Y.
June 29, 1960.